S.B. CIVIL WRIT PETITION NO.4442/2004
Natwar Lal & Ors.
Vs
Prahlad Singh & Ors.

DATE OF ORDER : 12.5.2005.

HON'BLE MR. PRAKASH TATIA,J.

Mr.MC Bhoot, for the petitioner.
Mr.SP Sharma, for the respondents.

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REPORTABLE

Heard learned counsel for the petitioner as well as learned counsel for the respondent.

The petitioner is aggrieved against the orders passed by the trial court by which the trial court dismissed the two applications filed by the petitioners on 31.8.2004 and 14.9.2004.

According to learned counsel for the petitioners, the burden to prove issues nos.6,7,8 and 9 was upon the defendants. The plaintiff who failed to lead evidence on other issues for which burden was upon the plaintiff, wants to lead evidence on those issues in the garb of rebuttal evidence on issues no.6,7,8 and 9. Finding this position, the petitioners-defendant submitted application on 14.9.2004 before the court below and prayed that the plaintiff had a right to lead evidence in rebuttal to issues nos.6,7,8 and 9, but since the petitioners-defendants (excluding defendant no.1) are not pressing the issues nos.6,7,8 and 9 and the

petitioners-defendants (excluding defendant no.1) shall not press the evidence of the defendants on these issues, therefore, no issue remains on which plaintiff can lead evidence, therefore, the case may be fixed for final arguments.

One application under Order 19 Rule 1 CPC was also filed by the petitioners in which they specifically submitted that the plaintiff cannot be permitted to produce evidence in rebuttal because by that plaintiff wants to produce evidence in support of issues no.1,2 and 3, initial burden of which was upon the plaintiff.

The trial court held that the witnesses have not been cross-examined on the affidavits and the evidence can be assessed only after the cross-examination of the deponents, therefore, at this stage, it cannot be ordered that the affidavits may be read with certain conditions (obviously deletion). The trial court further observed that so far as right of the petitioners to press or not to press issues nos.6,7,8 and 9 are concerned, he can do so. At the same time, the trial court also observed that defendant has right not to press evidence of any of the witnesses.

The petitioners are now aggrieved against the order of the court below by which petitioners' two applications were dismissed.

The contention of the petitioners, as noticed above, reveals that petitioners are apprehending that the plaintiff, who had no right to lead evidence on the issues for which initial burden was upon them and they failed to lead evidence, now wants to take the benefit of their right to lead evidence in rebuttal to prove the issues nos.1,2 and 3.

So far as not pressing of the issues nos.6,7,8 and 9 by the petitioners-defendants (excluding defendant no.1) are concerned, they may do so and since they have already expressed their willingness not to press the above issues, therefore, these issues if are framed only placing burden upon the petitioners then the issues nos.6,7,8 and 9 will not survive. But if any issue has been framed on the basis of pleading of the defendant no.1, then these issues will survive, which were framed on the basis of the pleading of the defendant no.1 also. However, the defendants-petitioners now cannot seek any relief of dismissal of the suit on the basis of the issues nos.6,7,8 and 9. The trial court also observed that the defendants-petitioners have right not to press the issues no.6,7,8 and 9 and that fact will be considered at the time of deciding the suit itself, but there is no question of deleting the issues at this stage. There appears to be no illegality in the order passed by the trial court so far as this question is concerned.

The trial court observed that so far as defendants have right not

press the evidence of the witnesses is concerned, that appears to be absolutely contrary to the law. Once the evidence has become part of the record that can be considered and assessed by the courts on the basis of the well known principles of laws, like no evidence can be read for which there is no pleading etc. The evidence in all cases are required to be through affidavits if not otherwise ordered by the court specifically. Therefore, there is a sea change in the procedure of the trial of the suit. The objection about the leading question and courts opportunity to take note of demeanour of witnesses at the time of even examination-in-chief, no more survives as the court cannot have opportunity to note the demeanour of the witness at the time of examination-in-chief in the forum of affidavits. Nor Court can know whether the affidavits are only result of all leading questions or whether any question at all was put to the witnesses or not. The necessary corollary is that there is every possibility that all evidence which may not be even admissible, may be hear say can be incorporated in the affidavit and the other party cannot have opportunity to raise any objection at the time when the said statement was authenticated by the Oath Commissioner or the Notary Public, as the case may be.

Therefore, it became the duty of the court to carefully examine the evidence of the witnesses and give opportunity to the parties to

show that evidence in affidavit cannot be read as evidence by showing the reasons for not admitting the evidence contained in the affidavit. However, there is no provision under any law, which provides deletion of evidence of any witness. The evidence may not be admissible in evidence and so can be declared by the court. The evidence cannot be read by the court on finding that the evidence is not admissible, but they cannot be deleted from any document containing the statement on oath by order of the court. It will be relevant to quote rule 50 of the Rules of the High Court of Judicature for Rajasthan, 1952

> "**50.Corrections in affidavit.-**All interlineations, alterations or erasures in an affidavit shall be initiated by the person swearing it and the person before whom it sworn. Such interlineations or alterations or erasures shall be made in such manner as not to obliterate or render it impossible or difficult to read the original matter. In case such matter has been obliterated so as to make it impossible or difficult to read it, shall be re-written in the margin and initialed by the person before whom the affidavit is sworn.
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> No interlineation or alteration or erasure shall be made in an affidavit after it has been sworn."

Therefore, as per rule 50 of the Rules of 1952 it is impermissible to amend even affidavit. Therefore, neither evidence can be amended

nor evidence can be withdrawn by saying that witness or the party does not want to press the evidence.

In this case effect of the evidence and the admissibility of evidence and the credibility to rely upon the evidence are the matter, which are still to be decided by the trial court and cannot be discarded on not pressing of the evidence.

In view of the above, no relief of withdrawal of evidence could have been permitted by the trial court to the petitioners. Therefore, there is no illegality in the order except that the trial court committed illegality in observing that the defendants have right to not press the evidence also.

According to learned counsel for the petitioner, even if the order of the trial court is maintained, still issues survives whether the plaintiff can lead the evidence in rebuttal when the defendants-petitioners (excluding defendant no.1) have not pressed the issues nos.6,7,8 and 9.

The trial court is directed to examine the matter afresh so far as right of plaintiff to lead evidence in rebuttal is concerned in the light of the relevant law as well as in the light of the fact that issues no.6,7,8 and 9 are no more pressed by the petitioners. However, as observed

above if the burden to prove the issues or any issue was upon the defendant no.1 then the issues no.6,7,8 and 9 cannot stand not pressed for the purpose of deciding the suit nor plaintiff will have no right to lead rebuttal evidence. The trial court is, therefore, in the change circumstances can take note of the subsequent event of not pressing the issues no.6,7,8 and 9 by the defendants-petitioners only to see whether still the plaintiff can lead evidence in rebuttal or not.

In view of the above, the writ petition of the petitioner is dismissed.

(Prakash Tatia), J.

c.p.goyal/-